

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1220

To be argued by
JAMES P. LAVIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1220

UNITED STATES OF AMERICA

Appellee.

—v.—

JACQUES BERENGUER, a.k.a. GUY SEBBANE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

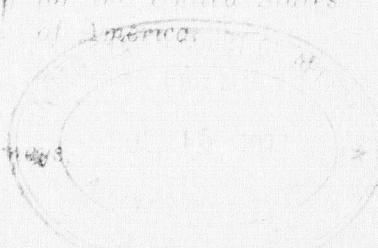
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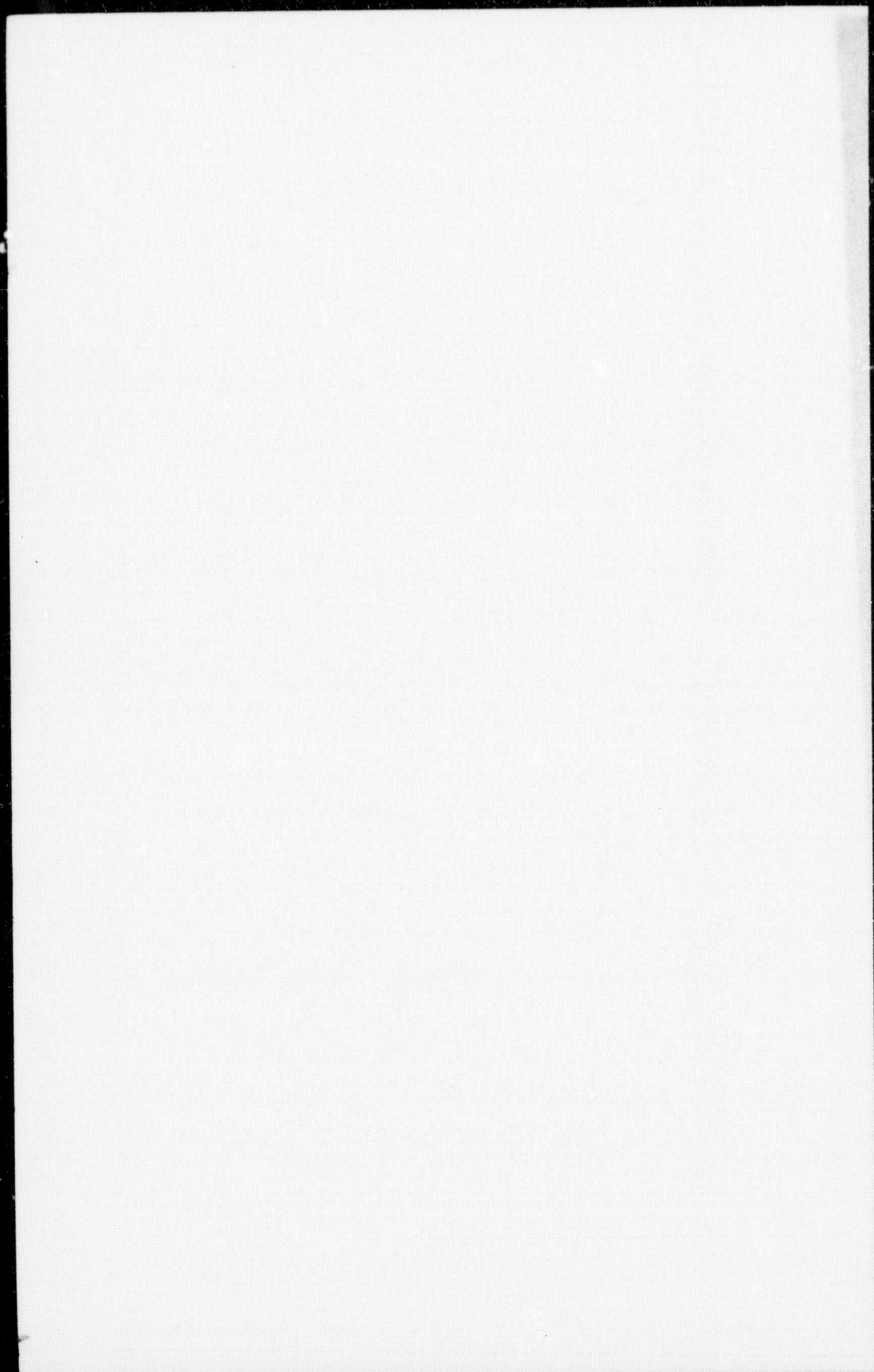


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UNITED STATES OF AMERICA,

Appellee,

—v.—

JACQUES BERENGUER, a/k/a Guy Sebbane,
Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Jacques Berenguer, a/k/a Guy Sebbane, appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on January 10, 1977, after a five day trial before the Honorable Charles E. Stewart, Jr., United States District Judge and a jury.*

Indictment 76 Cr. 832, filed on August 4, 1976, in two counts, charged defendants Jacques Berenguer, a/k/a Guy Sebbane, and Josalito Garcia with conspiracy to violate the federal narcotics laws (Count One) and distributing and possessing with the intent to distribute approximately

* Berenguer throughout the period of the conspiracy referred to himself as Guy Sebbane, the same name by which he was referred to at trial.

23.91 grams of cocaine on May 20, 1976 (Count Two), in violation, respectively, of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A) and 846.*

Trial commenced as to the defendant Berenguer ** on November 15, 1976, and concluded on November 19, 1976, when the jury found him guilty on both counts. On January 10, 1977, Judge Stewart sentenced Berenguer to two years imprisonment on each count, the sentences to run concurrently.

Berenguer is presently serving his sentence.

Statement of Facts

The Government's Case

1. A Brief Summary

The proof at trial demonstrated that in the Spring of 1976 defendant Jacques Berenguer negotiated with undercover agents of the Drug Enforcement Administration ("DEA") to sell five kilograms of cocaine for \$200,000. Berenguer, acting as a middleman, offered to supply the narcotics through his co-defendant, Josalito Garcia. Despite numerous negotiation sessions and promises of imminent deliveries, Berenguer was able to funnel through Garcia only a one ounce sample that was sold to the agents for \$1200. Throughout these negotiations, Berenguer regularly was seen to confer and meet with co-conspirator Carmelo Sansone, although Sansone originally was not introduced to the prospective "customers." After Garcia

* Although not named in the indictment, the Government designated Carmelo Sansone and Frank Fuentes as unindicted co-conspirators in a letter to defense counsel prior to trial.

** Garcia pleaded guilty prior to trial.

failed to make good on Berenguer's proposed sale, Sansone came into the foreground of the negotiations, met by himself with the agents, and renewed the same offer on the same terms made by Berenguer. Thereafter, in early June, 1976, Sansone delivered one-half kilogram of cocaine to the agents. In brief, the evidence showed an unlawful agreement to sell narcotics between Berenguer, Garcia, Sansone and others.

2. Agent Schnakenberg Meets Berenguer and Negotiations for Cocaine Begin

On May 14, 1976, DEA Special Agent William Schnakenberg, acting in an undercover capacity, met for the first time with defendant Jacques Berenguer, then known as Guy Sebbane, to discuss a substantial cocaine purchase. This meeting, which took place at Mama Mia's restaurant at 44th Street and 9th Avenue in Manhattan, was set up by an informant named Hugo who introduced Agent Schnakenberg to Berenguer. Since Berenguer spoke no English but only French, Hugo acted as Schnakenberg's interpreter. (Tr. 34-36).^{*} During the course of the conversation that day Schnakenberg—through Hugo ^{**}—told Berenguer that a price of \$40,000 per kilogram for five kilograms of cocaine, as proposed by Berenguer, was acceptable. The men agreed to meet again at Rudi's Bar, which was nearby, at seven o'clock that night to discuss their transaction further. Schnakenberg promised to bring along another friend who spoke French. (Tr. 36-39).^{***}

^{*} "Tr." refers to the trial transcript; "GX" to government exhibits. "Br." and "App." to the defendant's brief and appendix.

^{**} The informant Hugo disappeared prior to trial and was unavailable as a witness for either side.

^{***} Surveillance agents photographed the meeting and photographs of the meeting were received in evidence at trial. (Tr. 41-42; GXs 1, 2, 3).

At the appointed time that same evening, Schnakenberg, accompanied by DEA Special Agent Kevin Finnerty—who was also acting undercover—met with Berenguer at Rudi's Bar, also on 44th Street and 9th Avenue. This time Finnerty, who spoke French, acted as translator for Schnakenberg and Berenguer. Berenguer told Finnerty that he and Schnakenberg had talked that afternoon about the sale of five kilograms of cocaine at a price of \$40,000 per kilogram and that his girl friend's brother had access to large amounts of cocaine from Columbian sources. After further negotiations, Berenguer agreed to supply a sample of the cocaine on Monday, May 17, 1976. (Tr. 39-42; 196-202, 249-251).*

When both agents returned to Rudi's Bar on May 17th, Berenguer apologetically told them he was unable to get the cocaine sample and asked them to return later. At four o'clock that afternoon the agents again met with Berenguer who still did not have the sample. However, Berenguer assured them that his "brother-in-law", Josalito, had the cocaine and would deliver. Berenguer also mentioned to Finnerty that he had drug connections for heroin in France.

At Berenguer's insistence the undercover agents returned at 7:00 P.M. that night to meet with him at Mama Mias' restaurant and later at Rudi's Bar. Berenguer again told Schnakenberg and Finnerty that he was still unable to find Josalito, but would continue to look for him. Berenguer left the bar and returned an hour later at 10:00 P.M., still unable to locate Garcia.

* Surveillance agents had observed Berenguer meet with Josalito Garcia and his sister Anna earlier that day (Tr. 251-255).

By now impatient, Finnerty and Schnakenberg told Berenguer that they were not going to wait any longer and if Berenguer wanted to deal he should bring Josalito Garcia to the Howard Johnson's Motor Lodge on 57th Street and Eighth Avenue that same night. Anxious to assuage his prospective customers, Berenguer told the agents that he would proceed immediately to do the first transaction for a half-kilogram of cocaine for \$20,000, instead of the original one-ounce cautionary sample originally expected. (Tr. 42-46; 203-205).

3. The Agents Meet Garcia

Later that night, Schnakenberg and Finnerty drove to Howard Johnson's where, inside the hotel's bar, they found waiting Hugo and Berenguer. Berenguer promised that "Josalito" would arrive shortly and that he had five kilograms of cocaine. Schnakenberg showed Berenguer a "flash" roll of \$20,000 in government funds to demonstrate their readiness to do business and then left the bar.

Upon their return an hour later the agents found that Garcia finally had joined Berenguer and the informant. After being introduced, Schnakenberg told Garcia that he hoped the latter was ready to do business, as Berenguer had promised. Garcia replied that he was, but that he and Berenguer had to be very careful. Garcia sought to back-out of Berenguer's agreement to sell a half-kilogram of cocaine for \$20,000 without the initial purchase of a sample of an ounce for \$1200. With that, Garcia abruptly left the table, telling Schnakenberg he would talk to him the next day. (Tr. 50-53). Berenguer ran after Garcia and engaged him in a heated argument outside the restaurant. (Tr. 258-259). After his conversation with Garcia, Berenguer returned to the Howard Johnson's bar and told Finnerty that Garcia's abrupt conduct was a result of his nervousness, but that every-

thing would be taken care of the next day as earlier promised by Berenguer. (Tr. 216-217).*

4. The Cocaine Sample is Delivered

On May 20, 1976, as a result of a telephone call from the informant, Schnakenberg and Hugo drove to 90th Street and West End Avenue where Garcia was waiting. Garcia apologized to Schnakenberg for the delay in consummating the deal. He explained that Berenguer was moving too fast and that Garcia's "people" did not want to sell the five kilograms at one time without knowing Schnakenberg better. Garcia promised to deliver the ounce sample of cocaine to Schnakenberg that night. (Tr. 54-55).

In order to prove to Garcia and Berenguer that they were capable of purchasing the five kilograms of cocaine and serious about the deal, the agents decided to have \$200,000 in government funds available. The same night, Finnerty placed the money in the trunk of his car and drove to the Holiday Inn on West 57th Street, where he parked in front. (Tr. 220-221).

In the meantime, Schnakenberg went to Rudi's Bar at 7:00 P.M. where he met with Berenguer and Hugo. While waiting for Josalito Garcia, Hugo again served as translator for Berenguer and Agent Schnakenberg. At one point Schnakenberg told Berenguer that he was interested in heroin and was glad to hear that Berenguer had a good heroin connection in France.

* This promise was not fulfilled. The next day, May 19, 1976, Agent Finnerty spoke with Berenguer. Berenguer told Finnerty that some problems had developed but would be cleared up by the next day. He urged Finnerty to be patient (Tr. 217-229).

At approximately 8:30 P.M., Garcia entered the bar and asked Schnakenberg to go outside. Garcia entered Schnakenberg's car and the two drove to the location where Finnerty had parked the car containing the \$200,000. On the way, Garcia produced and delivered the ounce of cocaine (GX 4) for which Schnakenberg paid \$1200 in hundred dollar bills.

When they arrived at the Holiday Inn, Schnakenberg parked behind Finnerty's car. After obtaining the keys from Finnerty, Schnakenberg opened the trunk and showed Garcia the \$200,000.* Schnakenberg told Garcia he had proved himself as a legitimate customer by buying the ounce and that he wanted the five kilograms next. Garcia said he believed Schnakenberg, and that Berenguer would be happy to know that he had seen the \$200,000. Garcia and Schnakenberg then drove back to Rudi's Bar where Garcia spoke to Berenguer in a foreign language. (Tr. 57-67, 220-223, 262-265; GX 4).

Again, matters did not proceed as promised. On May 25, 1977, Garcia called Schnakenberg from Rudi's Bar, told him that he was with Berenguer** and that he had a half-kilogram of cocaine with him which he would sell for \$20,000. Garcia also offered Schnakenberg a full kilogram for \$40,000, but said that delivery would take an hour longer. Schnakenberg opted to wait the hour for the kilogram. By 10:30 P.M., long after Garcia's promised call had not been received, Schnakenberg called the informant at Rudi's Bar and instructed him to tell Berenguer and Garcia that the transaction was off for

* Surveillance agents on the third floor of the Holiday Inn videotaped the transaction. (Tr. 266-291; GX 6A).

** Berenguer got on the phone, but since Schnakenberg did not speak French, Garcia carried the conversation.

the night, a direct result of the agents' frustrations with Berenguer's and Garcia's empty promises. (Tr. 68-69).

5. The Deal Is Completed With Sansone

On June 3, 1976, Hugo, the informant, introduced Agent Schnakenberg to co-conspirator Carmelo Sansone—a companion of Berenguer who had been seen regularly with him during the period of Berenguer's negotiations and who was subsequently arrested with Berenguer in the latter's apartment—at the Market Diner at Eleventh Avenue and 43rd Street. At this meeting Sansone, without being asked by the agent, immediately offered to sell to Schnakenberg five kilograms of cocaine for \$200,000—the same quantity and price of cocaine that Berenguer previously had offered.* The following day, June 4, 1976, Schnakenberg and Hugo met with Sansone. Sansone directed Schnakenberg to give the \$20,000 to Hugo. Sansone and Hugo left the Market Diner and Hugo returned an hour later with a half kilogram of cocaine. (Tr. 80-83).

6. The Arrest of Berenguer and Sansone

On August 17, 1976, Special Agent Michael Pavlick and another agent went to Berenguer's apartment where they arrested Berenguer and Sansone, who was in the apartment, as well as Josalito Garcia's sister, Anna Garcia. Pavlick seized approximately \$3200 in hundred dollar bills from Berenguer's billfold, which also contained

* Schnakenberg, throughout the period of negotiations with Berenguer, had previously seen Sansone on numerous occasions with Berenguer, riding in Berenguer's car, at Mama Mia's Restaurant, outside of Rudi's Bar and elsewhere in that general area. Sansone spoke French as well as English and also said he had a connection in France. (Tr. 81-82).

his passport under the name Guy Sebbane.* (Tr. 376-387).

The Defense Case

Berenguer did not testify but called one witness, Anna Scattarello.

Scattarello testified that she owned Mama Mia's restaurant and that she knew the informant, Hugo, who had asked her to sign a work contract stating that he worked at her restaurant. She testified that in fact Hugo did not work at the restaurant, except occasionally to wash dishes, without pay. Scattarello testified that she signed the work contract.

On cross-examination, Mrs. Scattarello identified Berenguer and Sansone as customers in her restaurant. She also recalled Finnerty and Schnakenberg eating there, but stated that Berenguer never talked to anyone, including the two agents and Sansone (Tr. 393-408).

* In addition to the testimony of agents Schnakenberg, Finnerty and various surveillance agents, it was stipulated that a qualified chemist, if called as a witness would testify that GX 4, the one ounce cocaine sample, contained cocaine, lidocaine, sugar and sulfates and weighed 23.91 grams. It was further stipulated that the chemist would testify that the substance received by Schnakenberg on June 4, 1976 contained cocaine, lidocaine, sugar and borates, and weighed 515.97 grams. This cocaine itself was not introduced in evidence at the trial. (Tr. 388-389).

ARGUMENT

POINT I

The Testimony Regarding Co-Conspirator Carmelo Sansone's Sale Of One Half Kilogram Of Cocaine Was Properly Admitted.

Berenguer contends that the testimony regarding the sale of one-half kilogram of cocaine by his co-conspirator Carmelo Sansone * to Agent Schnakenberg was not sufficiently connected to him and that its admission into evidence seriously prejudiced defendant and requires reversal of his conviction. This argument is without merit.

The circumstances of Berenguer's and Sansone's regular association during and immediately after the time of Berenguer's negotiations, together with Sansone's own apparent familiarity with the goods, quantity and price desired by the "customer" Schnakenberg, plainly were sufficient to allow the jury to find that Berenguer was a middleman who encouraged Sansone to complete the deal he had been unable to consummate with Schnakenberg through Garcia. Thus, evidence of Sansone's delivery of one-half kilogram of cocaine on June 4, 1976 was relevant and connected to the conspiracy charged in the indictment.

First, during negotiations with Berenguer in May of 1976 for the sale of five kilograms of cocaine for \$200,000, Schnakenberg observed Sansone and the defendant together on numerous occasions at the locations where the

* Although Berenguer correctly states that Sansone was not named as a co-conspirator in the Indictment, Berenguer's counsel was notified by letter prior to trial that the Government considered both Sansone and Frank Fuentes to be Berenguer's unindicted co-conspirators. No claim was made to the contrary at trial. (Tr. 75-76).

negotiations were taking place. Sansone was in Mama Mia's Restaurant, outside of Rudi's Bar, together with Berenguer in a car, in the restaurant and on the street in conversation with each other. These conversations and meetings between Berenguer and Sansone were observed to take place on the occasions when the agents were actively pursuing the large scale purchase of cocaine with defendant. Berenguer and Sansone also were seen together in the vicinity of the bar and restaurant on other occasions. (Tr. 81).^{*} Additionally, when the agents went to arrest Berenguer on August 18, 1976, Sansone was with him in Berenguer's apartment, together with Josalito Garcia's sister, Anna.

Second, the illicit nature of this association was revealed by events subsequent to the May 20, 1976 purchase of the one ounce sample of cocaine from Garcia and Berenguer. Only nine days after Berenguer and Garcia had been unable to deliver the first kilogram quantity of the promised five kilogram sale, Sansone offered Schnakenberg five kilograms of cocaine at \$40,000 per kilogram: the very same unusually large quantity and price previously negotiated through Berenguer. Sansone also wanted to supply first a half-kilogram for \$20,000, the same condition that had been set by Berenguer and Garcia. Finally, the ingredients used to dilute the purity of the cocaine supplied by Sansone were essentially the same as those found in the cocaine sample previously delivered by Berenguer and Garcia.^{*}

^{*} On May 27, 1976, the informant Hugo had received a small sample of cocaine from Sansone and Frank Fuentes outside of Rudi's Bar. Hugo took it inside and gave it to Agent Schnakenberg. Approximately an hour or two later the defendant Berenguer entered the bar and talked with Agent Finnerty (Tr. 197-193, 235-37).

^{*} The ounce of cocaine sold by Garcia and Berenguer was diluted with lidocaine sugar and sulfates while Sansone's half-kilogram was "cut" with lidocaine, sugar and borates. (Tr. 388-89).

The extraordinary dove-tailing of the terms and offer made by both Berenguer and Sansone only days apart to the same customer, when viewed together with Sansone's presence throughout earlier negotiations, were more than sufficient to warrant the conclusion that Sansone, at Berenguer's request or suggestion, now had moved in to consummate the same transaction started by Berenguer.* Indeed, the jury could infer that Berenguer attempted to remain in the background because he feared that the agents no longer would deal directly with him in view of his repeated failures to deliver the promised goods. In short, the jury was entitled to find that, having failed to deliver through one supplier, Berenguer as a middleman familiarized Sansone with the pending transaction and thus participated in the unlawful agreement with him as well as with Garcia.

Defendant's argument that there was no connection shown between Berenguer and Sansone ignores the jury's right to draw reasonable inferences from the evidence and further to build an inference upon an inference. See *United States v. Ravich*, 421 F.2d 1196, 1204 n.10 (2d Cir.), cert. denied, 400 U.S. 834 (1970); *United States v. Medico*, Dkt. No. 76-1426, slip op. 3795, 3810 n.12 (2d Cir. May 25, 1977). The fact that Berenguer's and Sansone's joint association was also susceptible of an inference other than participation in a single conspiracy

* Not only were the facts that Sansone offered the same quantity of goods, at the same price to Schnakenberg, with the same preliminary condition, only nine days after Garcia had failed to deliver through Berenguer, so unique as to make extraordinary the possibility that this was mere coincidence, it was reasonable for the jury to conclude that no drug dealer such as Sansone would open negotiations with an unknown customer by offering an enormous quantity of cocaine. This logical inference further leads to the inescapable conclusion that Sansone and Berenguer must have discussed the terms of the deal and Schnakenberg's reliability and trustworthiness as a purchaser.

is not controlling. As this Court stated in *United States v. Calabro*, 449 F.2d 885, 890 (2d Cir. 1971), *cert. denied*, 405 U.S. 928 (1972):

"It is true that almost every aspect of Calabro's conduct is susceptible of an inference other than his participation in the conspiracy. However, as Judge Friendly observed in *United States v. Geaney*, *supra*, 417 F.2d at 1121 'Pieces of evidence must be viewed not in isolation but in conjunction.' A seemingly innocent act, when viewed in the context of surrounding circumstances, may justify an inference of complicity."

Thus, viewing the acts and statements of Berenguer and Sansone in their entirety, the jury plainly could find that both were members of the same conspiracy. *United States v. Calabro*, *supra*; *United States v. Cassino*, 467 F.2d 610, 618 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973); *United States v. Sisca*, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States v. Tramunti*, 513 F.2d 1087, 1105-07 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975). The evidence of Sansone's sale, therefore was admissible as proof of the existence of the conspiracy, even absent Sansone's presence at the trial. *United States v. Araujo*, 539 F.2d 287, 289 (2d Cir. 1976); *United States v. Papadakis*, 510 F.2d 287, 294-95 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Cohen*, 489 F.2d 945, 949 (2d Cir. 1973).

In any event, the proof of Sansone's subsequent delivery of the cocaine was neither a focal point of the Government's case nor inflammatory in the context of the overwhelming evidence of Berenguer's earlier participation in negotiations to sell sizable quantities of cocaine. Indeed, in view of the substantial direct proof that Berenguer negotiated to sell five kilograms of cocaine, repeatedly promised the agents that he would soon make delivery,

implored his co-defendant Garcia to go along with the transaction on the terms requested by the "customers," and ultimately delivered with Garcia the one ounce cocaine sample—the *only* narcotic evidence physically before the jury,*—the evidence that the deal ultimately was concluded through Sansone's efforts merely completed the picture of the transaction already convincingly and forcefully described to the jury.**

Moreover, the relative lack of harm of this testimony to Berenguer must have been apparent even to defendant's experienced trial counsel. While, prior to its introduction, she initially protested that the damage of this evidence would be irreparable if ultimately unconnected to the conspiracy charged, the trial court specifically invited a motion to strike the evidence should it later develop that the Government's proof was insufficient.*** Thereafter, neither

* It bears special emphasis that unlike the situation in *United States v. Falley*, 489 F.2d 33 (2d Cir. 1973), cited by defendant, the half-kilogram of cocaine was not physically introduced into evidence at all.

** Thus, the proof of Berenguer's guilt was overwhelming even without the June 4, 1976 delivery of cocaine by Sansone. In addition to the eye witness testimony of agents Schnakenberg and Finnerty, several surveillance agents corroborated the occurrence of the negotiation sessions participated in by Berenguer, as did the photographs taken of certain of those meetings.

*** "The Court: What I know of the testimony at the moment it seems to me is such that I think it is not improper to let it in. If it becomes necessary to strike it later on, I don't have any problem with doing that. So I think I'll allow it.

Mrs. Rosner: The problem is the efficacy of the objection to strike and that is what I think is the real danger to proceeding like this is.

The Court: I don't see here that we have a problem of that kind. I think this is quite properly the kind of thing which can be allowed in, and if it doesn't develop that the government's proof in fact complies with their offer and we don't have anything that the jury ought to take into account, I have no problem about telling them to ignore it." (Tr. 78-79).

a motion to strike this evidence nor a mistrial on the basis of its introduction, was ever made. Defense counsel did not request any limiting instruction with respect to this evidence. Nor did trial counsel object to the brief, innocuous comment on this evidence in the Government's summation, now touted by defendant as indicative of the prosecution's highly prejudicial use of Sansone's delivery. (Br. 14).*

Finally, defendant's claim that the testimony regarding that Sansone cocaine sale permitted the jury to convict Berenguer on the basis of his association with Sansone, is simply misguided. On no less than three occasions during the charge Judge Stewart instructed the jury that mere association or close friendship with one or more alleged conspirators, even if coupled with knowledge of illegal activity, was not sufficient to establish defendant's membership in the conspiracy or to establish that he aided and abetted the substantive crime. (Tr. 471-72, 489; 503-04.) In the face of these clear and proper instructions, to which no exception was taken, defendant's claim of prejudice is completely without merit.**

* Read in the context of the prosecutor's summation, his reference to the Sansone delivery merely placed this transaction in its chronological order and generally alluded to the inference that could be drawn of a single agreement.

** Striking proof that the jury was aware that mere association was insufficient to convict was evidenced by one of the jury's notes to the Court, during deliberations, which read:

"Count 2. The charge indicates that the defendant did wilfully and knowingly distribute and possess Schedule II controlled substance. Question: Does this mean actual physical possession of this controlling () substance or *involvement and/or association with the distribution of the controlled substance?*" (Tr. 497-98) (Emphasis in original).

In response, Judge Stewart again instructed the jury on the elements of aiding and abetting (Tr. 501-503) and for the third time told the jury—"mere knowledge of a crime and association or close friendship with a participant is not sufficient. To find

[Footnote continued on following page]

POINT II

The Money Seized From Berenguer's Apartment Was Properly Admitted Into Evidence.

Berenguer contends that the seizure of \$3200 from his apartment at the time of his arrest on August 18, 1976, violated his Fourth Amendment rights because the agents impermissibly entered his apartment to effectuate the arrest without a warrant, and therefore, that testimony about the money should have been suppressed.* He argues further that, in any event, the money was not properly seized because it was not in plain view in the apartment. Finally, Berenguer asserts that this evidence should have been excluded because it was not relevant and its prejudicial effect outweighed the probative value. These arguments, the first of which is raised for the first time on appeal, simply ignore the developments in the record before the trial court and are completely without merit.

A. Berenguer's Claim in the District Court And The Suppression Hearing

In the District Court, Berenguer conceded that the agents had probable cause to effectuate his arrest. He did not challenge either the propriety of the agents' entry into his apartment or the lawfulness of his arrest. Defendant's sole contention was that the money and other evidence seized was not in plain view and therefore, absent a search warrant, had to be suppressed. With the

a defendant guilty of aiding and abetting, you must, of course, find something more than mere knowledge on his part that a crime was being committed for a mere spectator at a crime is not a participant." (Tr. 500-504).

* The money seized was returned to defendant at the Magistrate's direction and, therefore, was not physically introduced in evidence. (Tr. 379-80, 387).

consent of both sides, Judge Stewart conducted a suppression hearing in the middle of the trial to address the limited issue raised by the defendant.*

At the suppression hearing Special Agent Michael Pavlick testified that on August 18, 1976, he and another Special Agent, Michael Levine, arrested the defendant Berenguer, co-conspirator Carmelo Sansone and Anna Garcia, Josalito Garcia's sister, in Berenguer's apartment.

Prior to the arrest, Pavlick received information from Interpol in Rome, Italy, that the individual previously known to him and to the other agents as Guy Sebbane in fact was Jacques Berenguer, a man wanted by the Italian authorities under an arrest warrant for murder. Agent Pavlick had reviewed an Interpol "wanted" bulletin that contained a photograph of Berenguer and his physical description. (Tr. 310-11, GX A).** In addition, on August 16 or 17, 1976, Pavlick received information that Berenguer was about to leave the country.

On the morning of August 18, 1976,*** Pavlick received a telephone call from the Special Agent in charge of the DEA's Rome or Milan office who verified the Italian authorities' definite request for Berenguer's provisional arrest and extradition.

Pavlick then discussed with an Assistant United States Attorney, by telephone, the possibility of obtaining an ar-

* The suppression hearing appears at Tr. 308-369.

** Government Exhibits accompanied by a letter refer to those received in evidence at the suppression hearing.

*** On August 17, 1976, Pavlick telephoned the DEA Interpol representative in Washington to request that they obtain the Italian arrest warrant. Later the same day he was informed that, as best as could be determined, the warrant was in Italy and would be forwarded as soon as possible. Pavlick was further instructed that if "Sebbane" and "Berenguer" were indeed one and the same person, the Italian Government had requested Berenguer's provisional arrest and extradition.

rest warrant on the narcotics charges against Berenguer, but a warrant was not obtained. (Tr. 308-11, 327-36). Instead, concerned that Berenguer would flee, the agents immediately proceeded to his apartment.

When the agents arrived at Berenguer's apartment in the early afternoon of August 18, 1976, Pavlick knocked on the door, announced himself as either the mailman or the superintendent and the door to the apartment was opened by Berenguer, who was wearing pajamas. Immediately upon the opening of the door Pavlick and Levine placed Berenguer under arrest. (Tr. 312, 342-43).^{*} The agents then proceeded into the apartment where they saw Carmelo Sansone seated at a table and he was also arrested. Berenguer and Sansone were then handcuffed together and seated on a bed in the same room as the table. (Tr. 314-315, GX C).^{**}

On the top of the bureau, which was located next to the bed where Berenguer and Sansone were seated, was a large open billfold of a type Pavlick knew was used by Europeans to carry passports and other important papers. Pavlick opened the inner pockets of the billfold and found the passport^{***} and also \$3200 in hundred dollar bills.^{****}

^{*} GX C is a drawing of the interior of Berenguer's apartment made by Agent Pavlick. (Tr. 313).

^{**} At this point Pavlick read Berenguer his rights in French and Anna Garcia—Josalito Garcia's sister and Berenguer's girlfriend—entered the apartment. Anna Garcia also was placed under arrest and seated on a couch. Charges against her later were dropped.

^{***} The passport was in the name of Guy Seban. (GX E).

^{****} This \$3200, as well as \$234 found in defendant's wallet, which was on top of the table and seized by the agents, was returned to Berenguer at the direction of the Magistrate so that it could be used for Anna Garcia's bail. (Tr. 387).

At the conclusion of the suppression hearing, Judge Stewart determined that the money, passport and other personal items obtained, had been seized lawfully as in plain view incidental to Berenguer's arrest. However, in the exercise of the trial court's discretion, Judge Stewart excluded the passport, driver's license and assorted papers as not relevant to matters on trial; the trial judge determined that the \$3200 found in the billfold was sufficiently relevant and probative to warrant admission of testimony concerning this seizure.

B. The Agents Were Lawfully in the Apartment To Arrest Berenguer

As noted earlier, in the District Court Berenguer conceded that Agents Pavlick and Levine had probable cause to arrest him in his apartment on August 18, 1976, and did not challenge the propriety of the agents' entry without a warrant or their basis to be in the apartment. Accordingly, the issue of the lawfulness of the agents arrest and entry was waived and should not be considered by this Court. *United States v. Braunig*, Dkt. No. 76-1448, slip op. 2773, 2778-80 (2d Cir., April 11, 1977); *United States v. Schwartz*, 535 F.2d 160, 165 (2d Cir. 1976), and cases therein cited. Indeed, only recently this Court has emphasized:

"The law in this Circuit is clear that where a party has shifted his position on appeal and advances arguments available but not pressed below, * * * and where that party has had ample opportunity to make the point in the trial court in a timely manner, * * * waiver will bar raising the issue on appeal." *United States v. Braunig, supra*, slip op. at 2779-80.

Even if this Court should reach Berenguer's much belated claim, the agents' arrest and entry into the

apartment were proper. The agents did not enter the apartment first to arrest Berenguer, but placed him under arrest at the door's threshold—a place where they had a right to be even without a warrant or Berenguer's consent. Such an arrest fully comports with constitutional requirements. *United States v. Santana*, 427 U.S. 38 (1976); *United States v. Watson*, 423 U.S. 411 (1976). Cf. *United States v. Mejias*, 552 F.2d 437 (2d Cir., 1977). Moreover, to the extent that the arrest may be viewed as having taken place inside the apartment, no arrest warrant was required. The law in this Circuit is clear that an agent may make a warrantless daytime entry into an apartment to effectuate an arrest for which there is probable cause, particularly where, as here, the entry is without force.* *United States v. Fernandez*, 480 F.2d 726, 740 n.20 (2d Cir. 1973); *United States v. Hall*, 348 F.2d 837, 841 (2d Cir.), *cert. denied*, 382 U.S. 947 (1965).**

* The fact that the agents employed a ruse to bring Berenguer to the door of the apartment does not convert their subsequent entry into a forcible one. *United States v. Raines*, 536 F.2d 796, 799-800 (8th Cir. 1976), *cert. denied*,—U.S.—(197) and cases therein cited; *United States v. De Feis*, 530 F.2d 14 (5th Cir. 1976), *cert. denied*,—U.S.—(197).

** Defendant's argument that a warrantless entry into an apartment to make an arrest violates the Fourth Amendment, absent exigent circumstances, is wrong. Neither *Fernandez* nor *Hall* add the "exigent circumstances" caveat now urged by Berenguer. Moreover, while the Supreme Court has never directly resolved the point, it has in a number of cases implicitly recognized that a non-forcible warrantless entry to effectuate an arrest is proper, even without the presence of "exigent circumstances." See, e.g., *Ker v. California*, 374 U.S. 23 (1963); *Miller v. United States*, 357 U.S. 301 (1958); *Johnson v. United States*, 333 U.S. 10,15, (1948). Cf. *United States v. Santana*, 427 U.S. 38 (1976); *United States v. Watson*, 423 U.S. 411 (1976). Finally, to the extent that cases such as *Dorman v. United States*, 435 F.2d 385 (D. C. Cir. 1970) (*en banc*) represent a different view—one which was available when this Court rendered its decision.

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Finally, contrary to Berenguer's bland denial, the suppression hearing demonstrated that there were exigent circumstances that justified the warrantless arrest. Berenguer was wanted under an Italian arrest warrant for a crime of violence—homicide. The agents had only recently discovered that the man they knew as Guy Sebbane in fact was the wanted fugitive, Berenguer, and also had learned that Berenguer was planning to leave the country in the near future. In such circumstances, the agents' decision to proceed immediately to effectuate the early-afternoon arrest as soon as they received confirmation of Berenguer's "wanted" status from the Italian authorities, clearly was proper and permissible.* *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970) (*en banc*); *United States v. Shye*, 492 F.2d 886 (6th Cir. 1974); *United States v. Phillips*, 497 F.2d 1131 (9th Cir. 1974).

C. The Seizure of the \$3200 Was Proper

Since the arrest of Berenguer was in all respects proper, the agents were permitted to undertake a limited

in *Fernandez*—this Court should not and need not reconsider the potential conflict presented since, as we demonstrate, exigent circumstances here justified the agents' non-forcible entry to make the arrest.

* Defendant's effort to make much of the delay between the completion of the narcotics transactions and his arrest, is to no avail on the question of exigent circumstances. First, the delay was occasioned by the proper law enforcement interest in furthering the on-going investigation then being conducted. Second, the agents decided to arrest Berenguer only when they learned both that he was an internationally wanted fugitive and that he was likely to flee the country, information that was investigated and confirmed between August 16th and August 18th, the day of Berenguer's arrest. Once this information was fully corroborated on August 18th, the agents were justified in believing that any further delay in then attempting to obtain an arrest warrant would heighten the likelihood that Berenguer would flee.

search of the areas within defendant's "immediate control" to uncover weapons or any evidence capable of destruction. *Chimel v. California*, 395 U.S. 752, 762-63 (1969); *United States v. Hayes*, Dkt. No. 76-1508, slip op. 3123, 3125-26 (2d Cir., April 21, 1977); *United States v. Jeffers*, 520 F.2d 1256 (7th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976). In the course of this limited search, the agents were entitled to seize the billfold containing Berenguer's passport and the cash, found on a night stand within his immediate reach.

Berenguer, to Pavlick's knowledge, was about to leave the country and most probably was the person wanted in Europe for murder. Thus, Agent Pavlick was justified in seeking the passport to determine if the person he had arrested in fact was Berenguer, and to take control of the passport to prevent its use. The seizure of the billfold was not part of a general rummaging through the apartment, but was a limited and pointed examination of a single personal item on the counter of the night stand.*

Alternatively, as the District Court held, since the agents' presence in Berenguer's room was lawful, the seizure of the billfold and its contents also was fully justified as within the agents' plain view. *Coolidge v. New Hampshire*, 403 U.S. 443, 466-68 (1971); *United States v. DiStefano*, Dkt. Nos. 76-1581-1582, slip op. 3539 (2d Cir., May 16, 1977); *United States v. Montiel*, 526 F.2d 1008 (2d Cir. 1975); *United States v. Rollins*,

* Indeed, since Berenguer was clad only in pajamas and had to dress to go to DEA headquarters, the agents properly could assume that he would take with him immediate personal effects such as the billfold and wallet. These items properly would have been inventoried—and therefore examined—at the time of defendant's removal to headquarters. *United States v. Robinson*, 414 U.S. 218 (1973); *United States v. Jeffers*, *supra*.

522 F.2d 160, 166 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *United States v. Candella*, 469 F.2d 173 (2d Cir. 1972).

Thus, the agents did not enter the apartment for the purpose of seizing the billfold, but to effectuate Berenguer's arrest. Once lawfully in the apartment they observed the billfold—which was distinctive to the agent as the type used to carry passports—on the table near the bed in the *same room* which the agents first had entered. Their location of the billfold and its contents was not part of any specific or general search, but merely was a direct result of the position they properly happened to enjoy in order to arrest Berenguer. In short, the discovery of the items seized was inadvertent and clearly justified as coming within the agents' plain view.*

* Indeed, measured against cases such as *United States v. Montiehl*, *supra*, and *United States v. DiStefano*, *supra*, the seizure here does not raise any meritorious question under the plain view doctrine. In *Montiehl*, this Court upheld under the plain view doctrine the seizure of a tinfoil packet containing cocaine residue and scrapings of white powder ringing the inside of a toilet bowl in the bathroom. The scrapings had been found only as a result of the agents' general canvass through the apartment in an attempt to locate the defendants. The tinfoil containing residue was confiscated because an agent previously had been in the apartment in an undercover capacity and knew that the tinfoil was likely to contain contraband. Although the Court found that the agents' discovery of these items was purposeful, the seizures were upheld since the "primary motivation" of the agents' entry and search was to arrest defendants. (526 F.2d at 1010.) Similarly, in *DiStefano*, the discovery of a bank bag found in a closet in defendant's bedroom was held to be within the police officer's plain view since the sighting of this evidence resulted from the officer's legitimate need to accompany defendant to her bedroom while she dressed to leave for the police precinct. *Montiehl* and *DiStefano* each presented far more serious questions as to the lawfulness of the police officers' respective positions when the contraband was observed and as to the "inadvertence" of each discovery, than the straightforward sighting and confiscation of the billfold and its contents in this case.

Berenguer argues, however, that although the billfold was in plain view, its contents were not and therefore the seizure was improper. This argument misapplies the plain view doctrine in an unduly technical way and should be rejected. Under the exigent circumstances of Berenguer's arrest, the agent properly considered defendant's passport to be relevant evidence of his identity and, as an item necessary to assist any attempt to leave the country, contraband. Accordingly, since the billfold observed by Pavlick was of the type used to carry a passport, the agent reasonably could consider the entire article as seizable evidence in plain view. Indeed, defendant's suggestion that the agent could seize the billfold but not examine its easily accessible contents, seeks to impose a compartmentalization of the plain view doctrine that both makes no sense and would be impossible to apply.*

* As contrasted with more secure and closed containers such as a briefcase, or a suitcase, the open and accessible nature of a billfold is such as to make impractical the contention that a law enforcement agent must distinguish between his right to seize the billfold and a Fourth Amendment restraint that prohibits his examination of its contents. Here, the agent had a specific reason to view the billfold as contraband because of its distinctive nature and he could reasonably believe that his examination of the contents did not amount to a further investigative intrusion. Cf. *United States v. Montiel*, *supra*. Thus, the cases cited by Berenguer (Br. 24-25) do not support his present argument, since each case involved either the opening of a container capable of being completely closed and locked, or further examination of a non-distinctive article without any basis for concluding that the article itself was or contained contraband.

Nor, for that matter, does an analysis of the defendant's expectation of privacy in the inner contents of the billfold further a sensible consideration of the issue raised by Berenguer. While it is arguable that a person retains only private papers and effects in a billfold, wallet or purse, and therefore has a heightened expectation in the privacy of the container, it is just as reasonable to conclude that this expectation of privacy does not extend beyond the place where one keeps the billfold itself. The point,

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In sum, viewed as either a limited search incident to arrest or as a plain view seizure, the obtaining of the \$3200 in cash at the time of Berenguer's arrest was proper and the trial court's decision not to suppress this evidence was correct.*

D. The Trial Court Did Not Abuse Its Discretion In Admitting Evidence About the Money Found At the Time of Berenguer's Arrest

As a final matter, Berenguer contends that testimony concerning the fact that \$3200 had been found at the

of course, is that while such metaphysical discussions may be relevant in theory, they do not fairly or practically resolve the reasonableness question presented to the Court. Moreover, if lawyers must struggle with such abstract concepts, it is impossible to offer any sensible guidance to the police officer on the street who must daily make quick legal judgments within the general guidelines supplied to him by the Courts.

*The Supreme Court's recent decision in *United States v. Chadwick*, 45 U.S.L.W. 4797 (June 21, 1977), does not require a different result. In *Chadwick*, the Supreme Court held only that a search warrant was required to open and examine the contents of a locked large footlocker that had been properly seized at the time of defendants' earlier arrest. *Chadwick* does not affect the legality of the agent's immediate search here under either the incident to arrest or plain view doctrines, since the Court noted that the search there had occurred long after the agents had gained exclusive control of the footlocker and after there was no danger that the arrestees might gain access to the property to seize a weapon or to destroy evidence. 45 U.S.L.W. at 4801. Indeed, the rationale of the *Chadwick* decision was that, under the circumstances there presented, the opening of the footlocker—which required either a key or forced entry—long after the agents had secured its removal and exclusive custody, made the warrantless search unreasonable, particularly since the nature of the locked container suggested a heightened expectation of privacy on the part of the owners. The majority's decision makes clear that the Court was not affecting the long standing right of a law enforcement officer under proper circumstances to seize and examine contraband incident to arrest or in plain view. *Id.*

time of his arrest was not relevant to the issues on trial and that the District Court therefore erroneously admitted this evidence. Although Berenguer's brief does not recognize the principle, it is clear that the decision to admit this evidence was one within the sound discretion of the trial judge, whose determination will not be overturned absent clear abuse. *United States v. Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976). See also, *United States v. Wiener*, 534 F.2d 15 (2d Cir. 1976), *cert. denied*, — U.S. — (197—); *United States v. Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970). A fair reading of the record here makes plain that Judge Stewart did not abuse his broad discretion in admitting this evidence.

The Government's proof at trial demonstrated that Berenguer was intimately involved in on-going negotiations to sell \$200,000 worth of cocaine as a middleman, and that in pursuit of this transaction he participated in the sale of a one ounce sample for \$1200, paid for in one hundred dollar bills. Against the backdrop of the quantities and dollar amounts of the contemplated transactions, proof of Berenguer's possession of a substantial sum of cash plainly was relevant to show that Berenguer had the financial means to engage in such a large scale transaction. Indeed, this Court recognized the precise point in *United States v. Tramunti*, 513 F.2d 1087, 1105 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975);

"The possession of large amounts of unexplained cash in connection with evidence of narcotics trafficking on a large scale is similar to the possession of special means, such as tools or apparatus, which is admissible to show the doing of an act requiring those means."

See also *United States v. Schwartz*, 535 F.2d 160, 165 (2d Cir. 1976). Similarly, in *United States v. Wiener*, *supra*, this Court recognized the probative value of pos-

session of "tools" of the narcotics trade in upholding the admissibility of a firearm found in defendant's apartment, even though there was no evidence that weaponry had been involved in the prior transactions proved at trial. Under *Tramunti*, *Schwartz*, and *Wiener*, evidence of the sizeable amount of cash was clearly relevant.

In the last analysis, Berenguer's claim of prejudice from the money evidence is both greatly exaggerated and at odds with his attempted distinction of *Tramunti*. If, as defendant contends, the \$3200 was not enough money to be relevant under *Tramunti*, the amount hardly can be said to have been in any way inflammatory or prejudicial. Moreover, the evidence of Berenguer's guilt was plain and compelling. Berenguer had negotiated directly with two law enforcement agents, whose testimony was convincingly corroborated by surveillance photographs of the several meetings, and by the one ounce of cocaine introduced into evidence. (GX 4). In the face of this other strong proof, the evidence of the cash found at arrest, while relevant, was not at the core of the Government's case. The prejudice Berenguer now ascribes to this testimony is simply not supported by the record viewed in its entirety. Accordingly, defendant's claim that this evidence requires reversal should be rejected.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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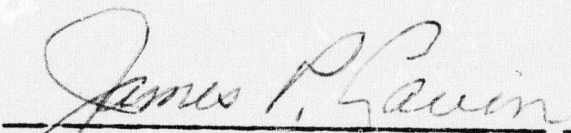
ss.:

JAMES P. LAVIN, being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 15th day of July, 1977
he served a copy of the within Brief For Appellant
copies
by placing the same in a properly postpaid franked
envelope addressed:

William J. Gallagher, Esq.,
Federal Defender Services Unit
509 United States Courthouse
Foley Square
New York, New York 10007

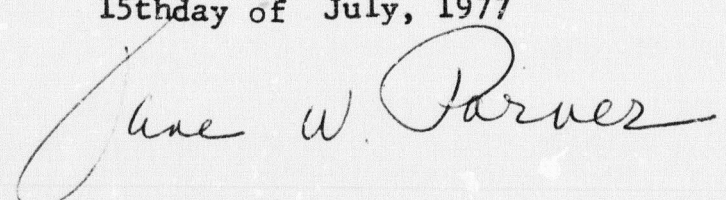
And deponent further says that he sealed the said
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at One St. Andrew's Plaza, Borough of Manhattan, City of
New York.


JAMES P. LAVIN

Assistant United States Attorney

Sworn to before me this

15th day of July, 1977


JANE W. PARVER
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Qualified in New York City